

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

-----X  
**PROCAPUI-PRODUTORES de CAMAROES de  
ICAPUI LTDA.**

**Plaintiff,**

**v.**

**MARCIAL GERALD LAYANI, G. F. HIGGINS,  
AMENDED  
INC., THERESA HIGGINS, as Executrix of  
THE ESTATE OF GERALD FRANCIS HIGGINS,  
THOMAS HIGGINS, ROBERT HIGGINS,  
RICHARD RUBIN and NOEL BLACKMAN,**

**Defendants.**

-----X  
**G.F. HIGGINS, INC., THERESA HIGGINS, as  
Executrix of the Estate of GERALD FRANCIS  
HIGGINS, THOMAS HIGGINS and ROBERT  
HIGGINS,**

**Third Party and  
Supplemental Plaintiffs,**

**v.**

**JOZEF ANAVIAN,**

**Third Party and  
Supplemental Defendant.**

-----X  
**S I R S:**

**07 Civil Action  
File No. 6627-BSJ  
Mag AJP**

**NOTICE OF MOTION  
TO DISMISS**

**COMPLAINT AND  
FOR OTHER  
RELIEF**

**PLEASE TAKE NOTICE** that, upon the Summons and Complaint herein, filed July 24, 2007, upon the declaration of Marcial Gerald Layani dated August 13, 2007, upon the decision and Order of the Court dated January 11, 2008, upon the Amended Complaint dated February 21, 2008 and upon the accompanying Memorandum of Law, Defendants G. F. HIGGINS, INC., THERESA HIGGINS as Executrix of the Estate of GERALD FRANCIS HIGGINS, THOMAS HIGGINS and ROBERT HIGGINS will move this Court before Hon. Barbara S. Jones, in Room 18B, United States Courthouse, 500 Pearl Street, New York, NY 10007, on the 30th day of March, 2008 at 9:30 in the forenoon of that day or as soon thereafter as counsel may be heard, for Orders and a Judgment seeking the following relief upon the grounds, statutes and Rules set forth:

1. An Order and Judgment pursuant to Rules 12(b)(6) and 9(b) F.R.Civ.P. dismissing the First and Second Claims for Relief (“RICO Claims”) and the Third Claim for Relief (“Common Law Fraud Claim”) of the Amended Complaint for failure to state a Claim for Relief and for failure to allege the purported Claims with the required particularity as set forth in the Court’s January 11, 2008 decision and Order and on the ground that the Plaintiff lacks standing to bring a RICO action and on the further ground that Plaintiff has waived or condoned any action of the Higgins Defendants;

2. In the event the Motion in ¶ 1 above is granted, an Order and Judgment dismissing the Fourth Claim for Relief and the entire action, as to all claims and as to all Defendants, pursuant to Rules 12(b)(1) and 12(h)(3) F.R.Civ.P. and 28 U.S.C. § 1332, on the ground that the Court lacks subject matter jurisdiction over this action since there is no diversity of citizenship or alienage jurisdiction between the Plaintiff and the Defendant MARCIAL GERALD LAYANI since Plaintiff is a foreign corporation and Defendant LAYANI is a U.S. citizen domiciled outside of the United States;

3. In the event the Court denies the Motions in ¶¶ 1 and 2 above, an Order pursuant to Rule 12(e) F.R.Civ.P. ordering Plaintiff to provide a more definite statement as to the allegations of the Complaint;

4. In the event the Court denies the Motions in ¶¶ 1 and 2 above, an Order dismissing all claims in the First and Second and Third Claims for Relief which seek damages for any claimed injury to Plaintiff allegedly resulting from the conduct alleged which was discovered or could, through the exercise of reasonable diligence, have been discovered by no later than July 24, 2003 on the ground that such claims are barred by the Statute of Limitations. (*See, Rotella v. Wood*, 528 U.S. 549, 120 S. Ct. 1075, 145 L.Ed. 2d 1047 (2000) and *Agency Holding Corporation v. Malley-Duff & Associates, Inc.*, 483 U.S. 143, 107 S. Ct. 2759, 97

L. Ed. 2d 121 (1987));

5. An Order, pursuant to Rules 15, 19, 20 and 21 F.R.Civ.P., that all parties heretofore named as Defendants or Third Party or Supplemental Defendants (other than Defendant Noel Blackman) remain as parties to the action on the ground that Plaintiff has not sought or obtained any Order permitting it to drop them, that the Higgins Parties have answered and have filed crossclaims, third party claims and supplemental claims against them and that the Higgins Parties would be prejudiced if they were dropped. The Higgins Parties have made no claim against Defendant Blackman and have no objection to his being dropped from the action.

6. Until the Court determines the above Motions, a stay of all discovery and other proceedings on the ground that the new Amended Complaint adds nothing of substance to the previous Complaint, the Court's January 11, 2008 decision and Order previously granted a stay and Plaintiff should not be able to proceed to conduct expensive and time consuming discovery given the absence of any new material facts being pled.

7. In the event the Court denies the Motions in ¶¶ 1 and 2 above, an Order granting a stay of further proceedings in this action or an abstention from proceeding, pursuant to the inherent authority of the Court to control its calendar, on the ground that there is already pending in the Supreme Court, New York County an

action which has been pending since September, 2005 in which the same transactions are at issue and in which the Plaintiff in this action has failed to assert as defenses the matters asserted as claims in this action and has, accordingly, waived them;

TOGETHER WITH such other and further relief as to the Court may seem just and proper and the costs of these Motions.

Dated: New York, NY  
March 6, 2008

Yours, etc.  
John J. Phelan, III, P.C.

By/S/ \_\_\_\_\_  
John J. Phelan, III (JP8632)  
Attorneys for Defendants G.F.  
Higgins, Inc., Theresa Higgins, as  
Executrix for the Estate of Gerald  
Higgins, Thomas Higgins and Robert  
Higgins  
1285 Avenue of the Americas,  
Suite 3500  
New York, NY 10019  
Tel: (212) 315-3082  
Fax: (212) 315-3028  
Email: jphelaniii@att.net

TO: Luigi P. DeMaio, Esq.  
DeMaio & Hughes, LLC  
Attorneys for Plaintiff  
330 East 30<sup>th</sup> Street  
New York, NY 10016

(212) 888-8300

Lawrence R. Lonergan, P.C.  
Attorney for Defendant Rubin  
275 Seventh Avenue  
New York, NY 10001  
email: llonergan1@aol.com

Noel Blackman, *Defendant pro se*  
14706 Hallwell Ct.  
Cypress, TX 77429-2385  
NoelBlackman@sbcglobal.net